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### Hot Pursuit

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### III. HOT PURSUIT: THE CASE OF *R. v. MILLS AND OTHERS*

#### A. Introduction

For a number of years the government of the United Kingdom has afforded a high priority to efforts to combat the misuse of drugs. Its multifaceted strategy attaches importance to securing progress on a number of fronts including, *inter alia*, "international cooperation to reduce supplies from abroad" and "increasing the effectiveness of police and Customs enforcement".<sup>1</sup> In furtherance of these ends the government has been an active participant in discussions and negotiations in a number of different forums which have given birth to several innovative agreements and arrangements of interest to the international lawyer.

The traditional international law of the sea has widely been regarded as providing insufficient flexibility to accommodate the needs of the law enforcement community when required to take action against foreign flag vessels suspected of involvement in drug trafficking activities when located in international waters.<sup>2</sup> Although there has been some interesting bilateral treaty practice in this regard,<sup>3</sup> the primary emphasis has been on the elaboration of multilateral instruments of which the arrangements contained in Article 17 of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances occupy pride of place.<sup>4</sup> As has been noted elsewhere, this established international standards, procedures and practices designed to facilitate the interdiction of drug shipments by sea and the prosecution of those involved.<sup>5</sup> This important international instrument entered into force in late 1990 and had attracted 111 State parties as of 25 May 1995.

1. *Tackling Drugs Together: A Consultation Document on a Strategy for England 1995-98* Cm.2678 (1994), p.21.

2. See e.g. W. C. Gilmore, "Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (1991) 15 *Marine Policy* 183, 184-185. See also L. B. Sohn, "International Law of the Sea and Human Rights Issues", in T. A. Clingan (Ed.), *The Law of the Sea: What Lies Ahead?* (1988), p.53, at p.59. Several agreements and arrangements have been concluded to permit law enforcement action in the territorial sea. See e.g. "UK (British Virgin Islands)/US: 'Shiprider' Memorandum of Understanding", Foreign and Commonwealth Office Press Release No.37, 7 Feb. 1990.

3. See the 13 Nov. 1981 Exchange of Notes concerning Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States, Cmnd.8470 (1981). See also J. Siddle, "Anglo-American Cooperation in the Suppression of Drug Smuggling" (1982) 31 *I.C.L.Q.* 726 and W. C. Gilmore, "Narcotics Interdiction at Sea: UK-US Cooperation" (1989) 13 *Marine Policy* 218.

4. See e.g. W. C. Gilmore, *Combating International Drugs Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991). The UK played an influential role in the elaboration, within the framework of the Council of Europe, of the 1995 Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. For the text of the agreement and the associated explanatory report see Council of Europe Doc.CDPC(94)22, Addendum; 27 June 1994. See also W. C. Gilmore, "Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement" *Marine Policy* (forthcoming).

5. See Gilmore, *op. cit. supra* n.2.

The United Kingdom ratified the 1988 Convention on 28 June 1991 and has since extended its application to Bermuda and the remaining dependencies of the Crown in the Caribbean basin.<sup>6</sup> In so far as interdiction at sea is concerned, primary legislation was required in order to take advantage of the discretionary terms of Article 4(1)(b)(ii) to establish jurisdiction over relevant offences committed on board the vessels of other State parties in international waters. The requisite authority was provided in the Criminal Justice (International Co-operation) Act 1990.<sup>7</sup>

Although action pursuant to the 1988 Convention is of ever increasing importance in UK practice, circumstances continue to arise where the legal basis for interference with foreign flag vessels on the high seas is sought in the general rules relating to the exercise of criminal jurisdiction at sea.<sup>8</sup> The November 1993 interdiction, known as "Operation Dash", carried out under the direction of HM Customs and Excise, is such a case. It involved the boarding of a St Vincent-registered merchantman on the high seas and the subsequent prosecution of those involved. It is of particular interest because of the light which it sheds on the nature and potential scope of the right of hot pursuit and the associated doctrine of constructive presence.

### B. The Facts

Operation Dash involved a sophisticated trafficking operation to import some 6.25 tons of cannabis with an estimated street value of £24 million into the United Kingdom. The cargo was shipped from Morocco on the diving support vessel MV *Poseidon*, registered in the Caribbean island State of St Vincent and the Grenadines—which was not, at the relevant time, a party to the 1988 Convention.<sup>9</sup> The plan called for the *Poseidon* to effect a transfer of the cargo to a second vessel at sea, which would then land it on UK territory. To that end one of the traffickers inspected a British-registered fishing trawler, the *Delvan*, then lying in Cork Harbour in the Republic of Ireland. It was deemed suitable for the task and set sail from Cork on the afternoon of 9 November 1993. Unknown to the conspirators, it "was crewed by undercover Customs and Police Officers".<sup>10</sup>

6. This extension, which took effect on 8 Feb. 1995, applies to Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat and the Turks and Caicos Islands.

7. (1990 c.5) ss.18–21, and Sch.3. The provisions of the Act also extend to offences on board British ships and stateless vessels. HM Customs and Excise Investigation Division is the designated authority for dealing with all requests under Art.17 and for instigating the appropriate procedures. The enforcement powers of the Secretary of State under s.20 of the 1990 Act were transferred to the Commissioners of Customs and Excise by s.23 of the Criminal Justice Act 1993 (1993 c.36).

8. E.g. Art.17(11) of the 1988 UN Convention contains a non-derogation provision which reads: "Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea." To similar effect see Art.2(3) of the 1995 Council of Europe Agreement, *supra* n.4.

9. St Vincent subsequently became a party, by accession, on 17 May 1994.

10. *R. v. Mills and Others* (unreported ruling on jurisdiction and abuse of process issues delivered in 1995 by His Honour Judge Devonshire at Croydon Crown Court). The undated typescript and other relevant information utilised in this article, including the co-ordinates for the point of seizure of the *Poseidon* (map point B), were kindly provided by the Solicitor's Office, HM Customs and Excise, London.

Acting on prior intelligence a task force was assembled under the direction of HM Customs and Excise. It initially consisted of HMS *Avenger*, a Type 21 frigate, and the Royal Fleet Auxiliary Ship (RFA) *Olva*. A Lynx helicopter was based on the former and two Sea King helicopters on the latter.<sup>11</sup> A small team of Customs officers was also embarked.

Shortly before midnight on 9 November HMS *Avenger* established radar contact with the *Poseidon* and ascertained that it was in international waters. "By 1025 on the 10th the *Poseidon* and the *Delvan* had rendezvoused at ... a position some 100 miles west of the Scillies and 100 miles south of Ireland in International Waters (indicated as position A on the map on p. 952). The rendezvous was monitored on radar by HMS *Avenger* and lasted from 1025 to 1440 when the *Delvan* opened from the *Poseidon*. During the rendezvous some 3½ tons of cannabis were transferred to the *Delvan*. The whole cargo could not be transferred because of the weather. At all times during the operation both vessels remained in international waters."<sup>12</sup>

At this stage the offload vessel set a course for the south coast of England while the *Poseidon* headed in a south-westerly direction back into the Atlantic. The ships of the task force continued to shadow the latter<sup>13</sup> while the *Delvan* was monitored from early on the morning of 11 November by the Customs cutter *Seeker*, which had been despatched from Plymouth for that purpose.<sup>14</sup> Shortly thereafter the *Delvan* entered British territorial waters. However, no immediate steps were taken to arrest either vessel. The strategy adopted by Customs was to allow the *Delvan* to land in the United Kingdom thus permitting the ready seizure of its cargo and the arrest of the shore party. As Judge Devonshire was to note in the course of the subsequent judicial proceedings at Croydon Crown Court, it was clear from the evidence "that the arrest of the *Poseidon* was secondary to that aim".<sup>15</sup>

The *Delvan* was kept under continuous surveillance by the Customs cutter during its somewhat leisurely passage through British waters<sup>16</sup> which culminated with its arrival in the south coast port of Littlehampton at 21.00 hours on 12 November. The cargo was unloaded and the *Delvan* departed Littlehampton at 21.10 hours.<sup>17</sup> The shore party was arrested shortly thereafter. The Customs officer in charge of the operation, who was based in London, was advised of these developments and he, in turn, requested that the Ministry of Defence order the task force to stop and arrest the *Poseidon*. This was done at 23.13 hours.<sup>18</sup> As Judge Devonshire has noted: "At the time when the authority to arrest the *Poseidon* was received she

11. See *idem*, p.2.

12. *Idem*, p.3.

13. See *idem*, p.4.

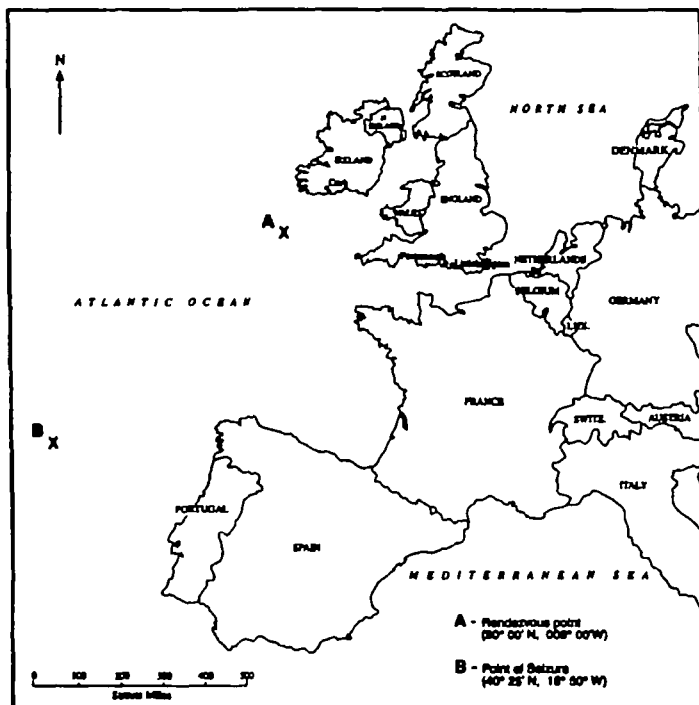
14. See *idem*, p.3.

15. *Idem*, p.7.

16. Which included a 2½-hour period in which it was anchored in Shanklin Bay. See *idem*, p.3.

17. The one conspirator on board the offload vessel, one Mr J. Maezele, disembarked at Littlehampton thus leaving the *Delvan* under the sole control of the undercover officers. See *ibid*. Maezele subsequently entered a guilty plea and received a 4½-year sentence.

18. See *idem*, pp.3-4.



was in International Waters and had never entered the territorial waters of any state."<sup>19</sup>

For a variety of reasons, including the relative size and construction of the vessels in question and the prevailing weather conditions, the decision was taken to effect the boarding of the *Poseidon* by helicopter and at first light.<sup>20</sup> Three helicopters were used early on 13 November. The commander of the task force

first attempted to call the *Poseidon* by name by VHF radio on Channel 16 on two separate occasions commencing at 0733, but received no reply. The content of these messages did not include any order to stop or heave to. By this time the helicopters were hovering in close proximity to the *Poseidon*, the *Lynx* was within 40 feet. The *Lynx* helicopter communicated with the *Poseidon* on VHF radio channel 16 and sent a message "You are ordered by Customs to heave to".<sup>21</sup>

Although this message was repeated, "No reply to any call from the *Lynx* was received."<sup>22</sup> The boarding was then carried out (see point B on the map above) and control of the vessel secured prior to 08.00 hours—some 65 hours and 20 minutes having elapsed since the *Delvan* had opened from *Poseidon* following the partial transfer of her illicit cargo and more than 54 hours after the former had first reached British territorial waters.

19. *Idem*, p.4.

20. See *idem*, pp.4-5.

21. *Idem*, p.5.

22. *Ibid*.

The members of the crew were arrested and, along with the *Poseidon*, brought to Portsmouth and charged with conspiracy to import cannabis.<sup>23</sup> "Soon after the defendants had first been brought before the magistrates the Crown gave notice to them by letter dated 8th December 1993 that they had been arrested in international waters in exercise of the right of 'hot pursuit' contained in international law which is to be found in the Geneva Convention on the High Seas of 1958."<sup>24</sup>

### C. *The Judicial Proceedings*

When, in the spring of 1995, the case came before Judge Devonshire at Croydon Crown Court six of the defendants, all of whom had been aboard the *Poseidon*, applied to stay the indictment. They contended that they were before the court as a direct consequence of an arrest which had taken place on the high seas in violation of international law.<sup>25</sup> They argued that the circumstances were such that the court should, in the light of the House of Lords decision in *R. v. Horseferry Road Magistrates' Court, ex parte Bennett*,<sup>26</sup> exercise its supervisory jurisdiction and stay the proceedings on the ground of abuse of process.<sup>27</sup>

Following extensive argument on this point the judge issued a ruling in which he held that "the *Poseidon* was properly arrested in international waters under the terms of the Geneva Convention and in accordance with the provisions of the international law of the sea".<sup>28</sup> He consequently disallowed the defendants' application, thus permitting the criminal prosecution to go forward. Subsequently charges against four of the six were, for a variety of reasons, dropped. A conviction was, however, secured against one of the individuals who had been on board the *Poseidon* and another entered a guilty plea. On 16 June they were sentenced to seven and a half and three and a half years' imprisonment respectively. At the time of writing no appeals proceedings have been initiated.

In arriving at his ruling on the abuse of process application the judge commented extensively on the right of hot pursuit and the associated doctrine of constructive presence.<sup>29</sup> Basic to his approach was the view that Article 23 of the 1958 Geneva Convention on the High Seas, to which the United Kingdom but not St Vincent was a party, constituted a codification of pre-existing customary international law.<sup>30</sup> In his view: "The right of 'hot pursuit' under which the *Poseidon*

23. See "Navy Prize Crew Seizes Drug Ship", *Daily Telegraph* (London), 18 Nov. 1993.

24. *Mills* ruling, *supra* n.10, at p.7.

25. The intervention had been undertaken without the prior consent of the flag State. It is of interest to note that St Vincent made no protest to the UK following the arrest of the *Poseidon*: see *idem*, pp.9-10.

26. [1994] 1 A.C. 42. Also reported as *Bennett v. Horseferry Road Magistrates' Court and Another* [1993] 3 All E.R. 138. See also A. L.-T. Choo, "Ex parte Bennett: The Demise of the Male Captus, Bene Detentus Doctrine in England?" (1994) 5 Crim. L. Forum 165. This is not the first occasion on which an unsuccessful attempt has been made to invoke *Bennett* in respect of an arrest in international waters. See *R. v. Stipendiary Magistrate, ex p. Newall* (unrep. Gibraltar Supreme Court decision delivered by Kneller CJ on 8 Oct. 1993). Type-script kindly provided by the office of the Attorney General of Gibraltar.

27. See *Mills* ruling, *supra* n.10, at pp.1 and 12.

28. *Idem*, p.22.

29. Other questions considered included the enforcement of treaty rights at the behest of individuals and the powers of the Crown Court in respect of abuse of process proceedings.

30. See e.g. *Mills* ruling, *supra* n.10, at p.13. The judge so regarded the 1958 Convention as a whole: see *idem*, pp.8-9.

was arrested is a power conferred by the general principles of international law of which the Geneva Convention was merely declaratory."<sup>31</sup> Furthermore, he subscribed to the view that such customary rules "had been incorporated in the Common Law of England".<sup>32</sup>

Having reached this not entirely uncontroversial conclusion regarding Article 23,<sup>33</sup> Judge Devonshire proceeded to examine the central question of whether or not the various requirements for the exercise of the right set out in Article 23 had been complied with during Operation Dash. He paid particular attention to the doctrine of constructive presence, the requirement of immediacy, and the acceptability of the use of VHF radio in issuing the order to the *Poseidon* to stop. Compliance by the United Kingdom with the remaining conditions was seemingly regarded as being sufficiently clear from the facts of the case. As we have seen, for example, considerable evidence was available as to the location of both the offload vessel and the *Poseidon* at all times considered relevant for the satisfaction of the requirement contained in Article 23(3).<sup>34</sup> Similarly, he was satisfied on the facts that the right of pursuit had not been lost, under Article 23(2), by virtue of the entry of the *Poseidon* into the territorial sea of any third State.<sup>35</sup> He was also persuaded that the vessels of the task force and the helicopters which effected the boarding met the authorisation and related requirements contained in Article 23(4).<sup>36</sup>

### 1. *Constructive presence*

It is beyond controversy that the rules relating to hot pursuit in international law, conventional or customary, have developed in a manner which encompasses the concept of constructive presence. As Lord McNair has explained: "When a foreign ship outside territorial waters sends boats into territorial waters which commit offences there, the mother ship renders herself liable to seizure by reason of these vicarious operations."<sup>37</sup> However, there has been a spirited debate over the years as to the scope of this doctrine.<sup>38</sup> It will be recalled that in its final draft articles, prepared in 1956, the International Law Commission lent its weight to the narrow, or "simple", version which required the use within territorial waters of the boats of the mother ship itself.<sup>39</sup> However, at the 1958 Geneva Conference on the

31. *Idem*, p.10.

32. *Idem*, p.9.

33. As the present writer has noted elsewhere there are reasons to doubt that the inclusion of an extended rather than simple version of the doctrine of constructive presence in Art.23 (3) was, at least in 1958, merely declaratory of existing customary law. See W. C. Gilmore, "Hot Pursuit and Constructive Presence in Canadian Law Enforcement" (1988) 12 *Marine Policy* 105, 108-110 and the references cited therein. See also e.g. R. R. Churchill and A. V. Lowe, *The Law of the Sea* (2nd edn, 1988), pp.112-113. More generally, as D. P. O'Connell has noted, "Article 23 ... introduced a number of qualifications which had not been clearly expressed in State practice": *The International Law of the Sea* (I. A. Shearer (Ed.), 1984), Vol.II, p.1079.

34. E.g. he noted, *Mills* ruling, *supra* n.10, at p.19: "The undisputed evidence shows that the identity and position of the *Poseidon* was known at all times to HMS Avenger."

35. See *idem*, p.4.

36. See e.g. *idem*, p.2.

37. A. D. McNair, *International Law Opinions* (1956), Vol.1, p.245.

38. See *supra* n.33.

39. See e.g. (1956) II Y.B.I.L.C. 284-285.

Law of the Sea, a proposal by Mexico to broaden the doctrine was carried in spite of the opposition of a number of States, including the United Kingdom.<sup>40</sup> This decision is reflected in Article 23(3), which reads, in relevant part, thus:<sup>41</sup>

Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone.

Given the view of Judge Devonshire that Article 23 of the 1958 Convention codified customary law, the discussion in this instance inevitably came to focus on whether the relationship between the *Poseidon* and the *Delvan* was such as to satisfy the Article 23(3) requirements; namely, team work and the existence of a mother ship relationship. Such terms are not further defined in the Convention. In this regard the judge first turned his attention to the controversial question of whether Article 23(3) covered one-off instances of the unloading of contraband by prearrangement. Citing the December 1976 Italian decision of *Re Pulos*<sup>42</sup> and the 1986 Canadian case of *R. v. Sunila and Solayman*,<sup>43</sup> among other authorities, he concluded that it did.<sup>44</sup>

This was not, however, sufficient to dispose of the issue in these circumstances. As the judge noted: "All the cases to which I have referred . . . were cases in which the daughter ship had come from the shore of the pursuing state and returned to those shores."<sup>45</sup> In the instant case the *Delvan* had set out from a port in the Republic of Ireland not the United Kingdom. In the view of the judge, however, the "essential element" common to the authorities was the fact of transshipment by prearrangement and, consequently, the country of departure was irrelevant.<sup>46</sup> He stated:<sup>47</sup>

It is clear to me that the policy consideration behind [the] doctrine is the prevention of the commission of crimes in the territorial waters of the state which exercises the right to hot pursuit. That consideration would be defeated if the point of departure was relevant, mother ships hovering outside territorial waters could never be arrested if the daughter ship departed from a different jurisdiction to her ultimate destination.

## 2. *Immediacy*

Judge Devonshire next turned to the significance, if any, which attached to the time lag between the entry of the *Delvan* into UK territorial waters and the commencement of the pursuit of the *Poseidon*.<sup>48</sup> In doing so he considered the flexi-

40. See *United Nations Conference on the Law of the Sea: Official Records*, Vol. IV, pp. 81 and 91.

41. Emphasis added. See also Art. 23(1).

42. (1976) 77 Int. L. Rep. 587.

43. (1986) 28 D.L.R. (4th) 450.

44. See *Mills* ruling, *supra* n. 10, at p. 16. For an overview of the differing positions adopted in the literature on this point see e.g. Gilmore, *op. cit. supra* n. 33, at pp. 110-111.

45. *Mills, idem*, p. 17.

46. See *ibid.*

47. *Idem*, pp. 17-18. The principle of objective territorial jurisdiction is often cited as a theoretical justification for the doctrine of constructive presence. See N. M. Poulantzas, *The Right of Hot Pursuit in International Law* (1969), p. 244. It would not appear to be departed from or otherwise undermined in such instances.

48. The defence submitted that pursuit should have been undertaken immediately after the *Delvan* entered the territorial sea of the UK: see *Mills, idem*, p. 18.



bility which had been afforded to the treatment of the notion of immediacy of the pursuit in both the academic literature<sup>49</sup> and in the somewhat similar case of *R. v. Sunila and Solayman*.<sup>50</sup>

In seeking to apply the law to the facts he first noted that "the offence of conspiracy was not necessarily complete until the drugs landed in Littlehampton. It was therefore arguable that the right to hot pursuit had not arisen until that time."<sup>51</sup> The subsequent passage of several hours between the receipt by the task force of the order to stop the *Poseidon* and the time when the helicopter operation was commenced for that purpose was similarly not regarded as fatal. In his view, "the commander of the Naval Forces was justified, having regard to all the ambient conditions, sea state and light, to delay the commencement of the hot pursuit until [first light] because the purpose of the pursuit, boarding and arrest was not capable of fulfilment at the earlier time and in those circumstances".<sup>52</sup>

### 3. The order to stop

The final issue to be confronted arose from the requirement, contained in Article 23(3), that "pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship". As was noted above, in this instance the signal to stop was transmitted from the Lynx helicopter by way of VHF radio. Counsel for the defendants argued that the operation thus failed to comply with the conditions governing the lawful exercise of the right of hot pursuit.<sup>53</sup>

It will be recalled that the absence of specific reference to the legitimacy of the use of radio signals in this context, which applies equally to pursuit by aircraft by virtue of Article 23(5)(a), was not the result of an oversight in the drafting process. As the International Law Commission stated in its 1956 commentary to draft Article 47: "To prevent abuse, the Commission declined to admit orders given by wireless, as these could be given at any distance; the words 'visual or auditory signal' exclude signals given at a great distance and transmitted by wireless."<sup>54</sup> The Commission also noted that "signals by wireless are barred in the case of aircraft also".<sup>55</sup>

49. The views of Poulantzas, *op. cit. supra* n.47, and C. H. Allen, "Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices" (1989) 20 *Ocean Dev. and Int.L.* 309, 318 were cited in this context. See *Mills, ibid.* See also e.g. O'Connell, *op. cit. supra* n.33, at p.1076 and M. S. McDougal and W. T. Burke, *The Public Order of the Oceans* (1962), p.914.

50. *Supra* n.43, at pp.454, 459-460. See also *Mills, idem.*, p.19. Judge Devonshire also considered that the historical justification for the conditions of immediacy and continuity of pursuit was to ensure that an innocent vessel was not arrested in error. He was satisfied that there would have been no difficulty of that kind in this case: see *ibid.*

51. *Idem.* p.20. Such a view is somewhat surprising in the light of the Court of Appeal judgment in *R. v. Sansom and Others* [1991] 2 All E.R. 145. In that case, which also involved drug trafficking by sea, Taylor LJ held that an extraterritorial conspiracy to commit a criminal offence in England would be triable in England even in the absence of an overt act within the jurisdiction. See also *Liangsiriprasert v. United States Government and Another* [1990] 2 All E.R. 866.

52. *Mills, ibid.*

53. See *idem.*, p.21.

54. *Op. cit. supra* n.39, at p.285.

55. *Ibid.*

Judge Devonshire was aware of this drafting history.<sup>56</sup> He was, nonetheless, persuaded that this should not be regarded as constituting an absolute bar to the use of radio signals. Although he cited a number of academic writings which urged a flexible view of this issue,<sup>57</sup> he appears to have been influenced, in particular, by evidence "that VHF radio is now the standard method of communication between vessels at sea which are required by International Radio Regulations to keep a watch on Channel 16".<sup>58</sup> VHF radio sets, in working order, were located on the bridge of the *Poseidon* and a copy of the relevant radio regulations was also found on board.<sup>59</sup> The presence of three helicopters hovering close to the vessel<sup>60</sup> at the time of the transmission of the radio signals was also regarded as relevant.<sup>61</sup> He concluded "that the messages sent by this medium comply with the preconditions of the Convention to the exercise of the right of hot pursuit".<sup>62</sup> In his opinion: "Modern technology has moved on since 1958 and the law must take account of those changes."<sup>63</sup>

#### D. Conclusions

It is widely accepted that: "Although the general parameters of the right of hot pursuit are not controversial, the proper exercise of the right is less clear in circumstances that do not fall neatly within the black letter rule."<sup>64</sup> In this case Judge Devonshire resolved all such uncertainties in a manner which fully favours the policy goal of the effective enforcement of the criminal law.<sup>65</sup> Such an approach cannot, however, be taken save at the expense of other central and long-established values of the international legal order.

Colombos, for example, articulated a radically different and arguably more orthodox form of analysis when he opined that "the right of pursuit, being a derogation from the general rule prohibiting any interference by a State with foreign vessels on the high seas, ought to be interpreted in a narrow sense".<sup>66</sup> Had the

56. See *Mills* ruling, *supra* n.10, at p.21.

57. The judge cited the views of McDougal and Burke, *op. cit. supra* n.49, at p.897 as authority for the approach adopted: see *Mills*, *ibid.* However, those contained at pp.917-918 and 923 seem to uphold, with regret, the orthodox position. Judge Devonshire also cites Allen, *op. cit. supra* n.49, at p.319. Whether that author was speaking *de lege lata* or *de lege ferenda* in writing that "most modern publicists agree that enforcing craft should be permitted to give the initial signal by radio" is open to question; see also pp.322-323. If the former, in citing McDougal and Burke as authority, he may have fallen into the same apparent error as the judge: see p.335, n.150.

58. *Mills*, *idem*, p.22.

59. See *idem*, p.6.

60. See *idem*, p.5.

61. See *idem*, p.22. There is some authority to the effect that in certain circumstances the initiation of the pursuit may itself be sufficient notice to the offending vessel that it should heave to. See *The Newton Bay* 36 F. (2d) 729, 731-732 (2nd Cir. 1929). See also R. C. Reuland, "The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention" (1993) 35 *Virg.J.Int.L.* 557, 583-584 and M. M. Whiteman, *Digest of International Law* (1965), Vol.4, p.685.

62. *Mills*, *ibid.*

63. *Ibid.*

64. Reuland, *op. cit. supra* n.61 at p.557.

65. An approach favoured by some commentators: see e.g. Allen, *op. cit. supra* n.49, at p.322.

66. C. J. Colombos, *The International Law of the Sea* (6th edn, 1967), p.170.

judge given greater weight to the doctrine of the freedom of the high seas in the interpretation of, for example, the nature and extent of the concept of extended constructive presence the outcome might well have been both different and more consistent with the traditional approach of the UK government.<sup>67</sup> His preference for an interpretation sensitive to the needs of the law enforcement community is, however, most evident in the treatment of the use of VHF radio to give the order to the *Poseidon* to stop. Here, the decision to disregard the clear drafting history of Article 23(3) and uphold the validity of the use of such methods is open to question.<sup>68</sup> The contention that the law must be construed in a manner which takes account of technological change may also be regarded as losing some of its initial attraction when it is recalled that the 1958 Convention wording is repeated, verbatim, in Article 111(4) of the 1982 United Nations Convention on the Law of the Sea.

For these reasons, among others, it would no doubt be of value were any appeal process to afford the opportunity to a higher court to give this most interesting case further and more detailed consideration.

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67. British opposition to the extended doctrine of constructive presence long predates its negative vote at the 1958 Conference on the Mexican amendment to which reference was made above: see e.g. Poulantzas, *op. cit. supra* n.47, at p.76, n.21. Judge Devonshire was familiar with this fact: see *Mills* ruling, *supra* n.10, at p.16.

68. This notwithstanding the fact that the approach of the ILC and the 1958 Conference has been subject to criticism from a practical viewpoint. See e.g. O'Connell, *op. cit. supra* n.33, at p.1091, and F. Wooldridge, "Hot Pursuit", in *Encyclopedia of Public International Law* (1989), Vol.11, p.145, at p.146.

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